Supreme Court, U.S.
FILED
SEP 23 1999
OFFICE OF THE CLERK

(2)

No. 99-375

In The

Supreme Court of the United States

STEVE EDWARD ROACH,

Petitioner,

v.

DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK L. EARLEY
Attorney General of Virginia

ROBERT Q. HARRIS
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2 PP

QUESTIONS PRESENTED

1. Does Roach's "proportionality review" claim fail to raise a cognizable federal issue?

2. Is there any "compelling" reason to review the Fourth Circuit's fact-specific conclusion that there was sufficient evidence to support the jury's "future dangerousness" finding?

3. Would petitioner's request to extend *Simmons v. South Carolina* to cover a capital defendant who was ***eligible*** for parole require the creation of an impermissible "new rule?"

4. Is there any "compelling" reason to review Roach's defaulted claim challenging the jury instruction requiring a unanimous sentence decision?

5. Would acceptance of Roach's claim – that the Constitution requires an assessment of maturity and culpability prior to transferring a juvenile for trial as an adult – violate the "new rule" doctrine?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Prior Proceedings 1

B. Facts of the Offenses 2

REASONS TO DENY CERTIORARI 6

I. THE FOURTH CIRCUIT'S RULING THAT ROACH'S "PROPORTIONALITY REVIEW" CLAIM RAISED ONLY A MATTER OF STATE LAW, AND THAT THE VIRGINIA SUPREME COURT'S GOOD FAITH APPLICATION OF STATE LAW RAISED NO DUE PROCESS ISSUE, PRESENTS NO COMPELLING REASONS FOR REVIEW 6

II. THE FOURTH CIRCUIT'S RULING UPHOLDING THE STATE COURT'S FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE "FUTURE DANGEROUSNESS" AGGRAVATING CIRCUMSTANCE DOES NOT WARRANT REVIEW 11

III. ROACH'S "PAROLE ELIGIBILITY" CLAIM WAS CORRECTLY REJECTED BY THE FOURTH CIRCUIT AND, IF ACCEPTED, WOULD VIOLATE THE "NEW RULE" DOCTRINE 12

IV. ROACH'S DEFAULTED CLAIM ATTACKING THE SENTENCING INSTRUCTION PRESENTS NO COMPELLING REASON FOR REVIEW 14

V. THE FOURTH CIRCUIT RULED CORRECTLY THAT NO ADDITIONAL ASSESSMENTS OF A JUVENILE'S MATURITY ARE CONSTITUTIONALLY REQUIRED BEFORE TRANSFER FOR TRIAL AS AN ADULT 15

TABLE OF CONTENTS – Continued

Page

CONCLUSION 17

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997) 13

Boyd v. Johnson, 169 F.3d 907 (5th Cir. 1999) 13

Caspari v. Bohlen, 510 U.S. 383 (1994) 10, 17

Eaton v. Commonwealth, 397 S.E.2d 385 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991) 15

Evitts v. Lucey, 469 U.S. 387 (1985) 10

Johnson v. Texas, 509 U.S. 350 (1993) 17

Jones v. United States, 119 S.Ct. 2090 (1999) 15

Lowenfield v. Phelps, 484 U.S. 231 (1988) 8

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996), *rev'd on other grounds*, 519 U.S. 1030 (1997) 10

McCleskey v. Kemp, 481 U.S. 279 (1987) 8

Murphy v. Commonwealth, 431 S.E.2d 48 (Va.), *cert. denied*, 510 U.S. 928 (1993) 11

O'Dell v. Netherland, 521 U.S. 151 (1997) 14

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1988) 10

Pennsylvania v. Finley, 481 U.S. 551 (1987) 10

Pulley v. Harris, 465 U.S. 37 (1984) 7, 8

Roach v. Angelone, 176 F.3d 210 (4th Cir. 1999) 1

Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996) 1, 6, 9, 12, 13, 16

Roach v. Virginia, 519 U.S. 951 (1996) 1

Roach v. Warden, Record No. 962568 1

TABLE OF AUTHORITIES – Continued

Page

Simmons v. South Carolina, 512 U.S. 154 (1994)....13, 14

Spencer v. Commonwealth, 384 S.E.2d 785 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) 15

Stanford v. Kentucky, 492 U.S. 361 (1989)..... 16

Sumner v. Mata, 449 U.S. 539 (1981)..... 6

Teague v. Lane, 489 U.S. 288 (1984) 10, 17

Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992) 16

Tuilaepa v. California, 512 U.S. 967 (1994) 7

Turner v. Commonwealth, 364 S.E.2d 483 (Va.), *cert. denied*, 486 U.S. 1017 (1988)..... 9

Walton v. Arizona, 497 U.S. 634 (1990)..... 8, 9, 10

Wilson v. Greene, 155 F.3d 396 (4th Cir.), *cert. denied*, 119 S.Ct. 536 (1998) 13

Wright v. Commonwealth, 427 S.E.2d 379 (Va. 1993) 16

STATUTES AND RULES

28 U.S.C. § 2254(e)(1)..... 6

§ 17-110.1(C)(2), Code of Virginia 7

§ 17.1-313(C)(2), Code of Virginia 7

§ 18.2-31, Code of Virginia..... 8

§ 19.2-264.4, Code of Virginia.....8, 11

§ 19.2-264.4(B)(v), Code of Virginia..... 16

§ 19.2-264.4(C), Code of Virginia 1

§ 19.2-264.4(E), Code of Virginia 14, 15

§ 53.1-232.1(iii), Code of Virginia..... 2

STATEMENT OF THE CASE

A. Prior Proceedings

It is undisputed that Steve Edward Roach murdered 74-year-old Mary Ann Hughes on December 3, 1993, by shooting her in the chest with a shotgun. Roach was convicted by a Greene County, Virginia, jury of capital murder, robbery, and use of a firearm, on March 2, 1995. A separate sentencing proceeding was held on March 3, 1995, and the jury imposed the death sentence, finding the "future dangerousness" aggravating factor. Va. Code § 19.2-264.4(C). The trial court imposed the death sentence on May 18, 1995. The Virginia Supreme Court affirmed Roach's convictions and death sentence on March 1, 1996. *Roach v. Commonwealth*, 468 S.E.2d 98 (Va. 1996). This Court denied certiorari on October 21, 1996. *Roach v. Virginia*, 519 U.S. 951 (1996).

Roach's state habeas corpus petition was dismissed by the Virginia Supreme Court on April 30, 1997, and his petition for rehearing was denied on August 1, 1997. *Roach v. Warden*, Record No. 962568.

Roach's federal habeas petition was filed in the district court on February 12, 1998. On July 29, 1998, the district court ordered the petition dismissed. Roach's subsequent motion to alter or amend judgment was denied on August 25, 1998. On May 4, 1999, in a published opinion after full briefing and oral argument, the United States Court of Appeals for the Fourth Circuit denied Roach a certificate of appealability and dismissed the appeal. *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999) (Pet. App. 1a). Roach's petition for rehearing and suggestion

for rehearing *en banc* was denied on June 1, 1999. (Pet. App. 84a).

On June 29, 1999, as required by Virginia Code § 53.1-232.1(iii), the Greene County Circuit Court set Roach's execution for August 25, 1999. (Pet. App. 85a). On August 6, 1999, the Virginia Supreme Court stayed Roach's execution pending disposition of a *coram vobis* appeal and successive habeas petition filed in that court raising issues unrelated to Roach's federal habeas petition. (Pet. App. 90a). The Virginia Supreme Court heard argument in the case on September 15, 1999, and a decision is expected by November 5, 1999.

B. Facts of the Offenses

The Virginia Supreme Court found the facts of the offenses to be as follows:

> On the evening of December 3, 1993, Mary Ann Hughes was shot and killed in her home about five miles west of Stanardsville. Hughes was standing at her open front door when she was shot. Her body was discovered the next day.
>
> The cause of death was a single shotgun wound to the chest, which caused injury to an artery, the chest wall, and the right lung. Dr. Deborah Kay, the medical examiner who performed the autopsy on Hughes, recovered shotgun pellets and wadding from Hughes's chest. The pellets and wadding were identified as number eight shot from a 12 gauge Remington shot shell case.
>
> The day before the killing, Roach brought a 12 gauge shotgun to a neighbor's house, and he and two friends engaged in shooting the gun in

the back yard using number eight shot. The police later recovered from the neighbor's back yard number eight shot that was consistent with a 12 gauge Remington shell case.

Roach and Hughes were also neighbors. Roach helped Hughes with household chores and also spent a great deal of time visiting her. The evidence showed that Roach was familiar with Hughes's habits, and that Hughes customarily deposited her social security check in the bank within the first few days of each month.

On the night she was killed, Hughes's purse, containing a Discover credit card and approximately sixty dollars in cash, was taken from her home. Hughes owned a 1981 Buick Regal, which also was taken.

In the early morning hours of December 4, 1993, Gregory Lee Giuriceo, Jr., a deputy sheriff for Nottoway County, noticed a Buick Regal parked in a parking lot of a shopping center in Blackstone. Roach was identified by Giuriceo as the operator of the car. After leaving the parking lot, Giuriceo determined that the automobile was registered to Hughes.

Later in the morning of December 4, 1993, Roach attempted to use Hughes's Discover bank card at an automated teller machine in Louisburg, North Carolina. A video tape from the machine showed Roach attempting to withdraw cash from Hughes's account.

On December 5, 1993, Trooper David F. Chavis of the South Carolina Highway Patrol observed a 1981 Buick Regal automobile with Virginia plates which was being driven at 69 miles per hour in a 55 mile per hour zone. He activated

the lights on his patrol car and proceeded behind the Buick. The driver of the Buick drove the automobile over to the left shoulder of the road, got out of the car, ran into the woods at the side of the road, and escaped. The driver was wearing clothes which matched the description of the clothes Roach had been seen wearing for the previous two days.

Trooper Chavis impounded the vehicle and traced its ownership to Hughes. Items retrieved from the automobile included Hughes's purse, a blue jacket, a number eight load shotgun shell, and a plastic bag from a Winn-Dixie grocery store. Mahlon Jones, a fingerprint expert employed by the Commonwealth's Division of Forensic Science, identified a latent palm print from the plastic bag as matching Roach's left palm print. In addition, latent fingerprints were recovered from the automobile which matched Roach's fingerprints.

Roach made several telephone calls to his aunt, Annie Betty Dean, while he was in North Carolina and South Carolina. During those telephone conversations, she asked him to "come home and give [himself] up." On December 6, 1993, Roach contacted Sheriff William L. Morris and arranged to come that day with his father to the Sheriff's Department for questioning.

At the Sheriff's Department, Morris advised Roach of his *Miranda* rights in the presence of Roach's father. Roach waived his rights, and both he and his father signed the waiver form. Sheriff Morris then questioned Roach out of his father's presence. Clarence Roberts, an acquaintance of the Roach family and an employee of

the Department of Alcoholic Beverage Control, was present with Morris during the interview.

At first, Roach told Morris that he and a friend, Scott Shifflett, went to Hughes's house on the evening of December 3, 1993. Roach said that Shifflett left the 12 gauge shotgun at the door, and that they entered the house and played Yahtzee with Hughes. Roach recounted that Shifflett then took the keys to the Buick Regal and the two began to leave the house. Roach said that, after he left, Shifflett ran back to the front door, fired one shot, and ran back to the Buick with Hughes's purse. According to Roach, Shifflett said that he had "fired through the roof to scare her."

Roach stated that Shifflett then jumped into the driver's seat of the Buick and they drove to North Carolina. He said that Shifflett must have tried to use Hughes's Discover credit card while Roach was in a Winn-Dixie store making some purchases. Roach also stated that he and Shifflett abandoned Hughes's vehicle in North Carolina.

During the questioning, Morris related to Roach certain evidence that had already been discovered, stating, "[W]ith all these discrepancies in the story, . . . I'm finding it really a little difficult to believe some of the things you're telling me." Roberts then told Roach that he knew Roach was lying and that "this is a heavy burden to carry on your shoulders for the rest of your life, if you committed this act you need to tell Sheriff Morris and you need to unburden yourself."

Roach then told Morris,

> I went over there and saw her counting the money and as I was leaving, I had the shotgun laying at the door and I shot her, took the money, the car and left, went to North Carolina. And I cashed – I tried to use – use the credit card but – about four times[,] but it wouldn't work.
>
> When asked where he shot Hughes, he answered, "In the chest."

Roach v. Commonwealth, 468 S.E.2d at 101-103. (Pet. App. 32a-35a). The Virginia Supreme Court's findings of fact on the matters raised on appeal must be presumed correct. 28 U.S.C. § 2254(e)(1) (state court findings of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); *Sumner v. Mata*, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

REASONS TO DENY CERTIORARI

I. THE FOURTH CIRCUIT'S RULING THAT ROACH'S "PROPORTIONALITY REVIEW" CLAIM RAISED ONLY A MATTER OF STATE LAW, AND THAT THE VIRGINIA SUPREME COURT'S GOOD FAITH APPLICATION OF STATE LAW RAISED NO DUE PROCESS ISSUE, PRESENTS NO COMPELLING REASONS FOR REVIEW.

Roach asserts that the Virginia Supreme Court misapplied *Virginia* law in conducting its "proportionality

review" of his death sentence.[1] Both courts below correctly ruled that Roach's claim presents no valid grounds for federal habeas corpus relief, and that the Virginia Supreme Court "conducted a thorough review of Roach's sentence in compliance with Virginia law." (Pet. App. 12a, 74a).

In *Pulley v. Harris*, 465 U.S. 37 (1984), this Court expressly held that appellate comparative proportionality review was not required by the Eighth Amendment:

> Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.
>
> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.

465 U.S. at 50-51. Instead, the Court has looked to the methods States have employed at trial to satisfy the Eighth Amendment's requirement of narrowing the class of defendants eligible for the death penalty. *Pulley*, 465 U.S. at 48-50. *See also Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994).

---

[1] Virginia law provides that the Virginia Supreme Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code § 17.1-313(C)(2) (formerly § 17-110.1(C)(2)).

In Virginia, the narrowing function is accomplished twice during the trial proceedings. In the guilt phase, the jury first must find the defendant eligible for the death penalty by considering his crime within a narrow class of statutorily defined capital murder. In the sentencing phase, the jury then must find an additional aggravating circumstance before a death sentence may be imposed, *see* Va. Code 19.2-264.4, thus further narrowing the death-eligible class. *See* Va. Code § 18.2-31; *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988) (narrowing function may be accomplished at guilt phase by narrow definition of capital offense and/or sentencing aggravating factors).

As this Court held in *Walton v. Arizona*, 497 U.S. 634 (1990), appellate comparative proportionality review is not required where, as in Virginia, the statutory procedures at trial adequately channel the sentencer's discretion:

> In effect, Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed – and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 95 L.Ed. 2d 262, 107 S.Ct. 1756 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 79 L. Ed. 2d 29, 104 S.Ct. 871 (1984). Furthermore, the Arizona Supreme

> Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Walton, 497 U.S. at 655-656.

In Roach's case, the Virginia Supreme Court clearly conducted its review to determine: "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See Roach*, 468 S.E.2d at 113-114. The Court compared Roach and his conduct to the defendants and crimes in other cases involving robbery and a "future dangerousness" finding, and concluded that "while there are exceptions, juries in this Commonwealth *generally* impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." *Roach v. Commonwealth*, 468 S.E.2d at 114. Roach complains that his case, and his circumstances, should be deemed less aggravated than others the state court considered, but proportionality review under Virginia law does not require each capital case to "equal in horror the worst possible scenario yet encountered." *Turner v. Commonwealth*, 364 S.E.2d 483, 490 (Va.), *cert. denied*, 486 U.S. 1017 (1988). The Virginia Supreme Court's fact-intensive assessment of Virginia cases clearly presents no federal issue for this Court to review.

Roach thus asks that this Court do precisely what *Walton* holds is beyond the scope of federal collateral

review: to "look behind" the state court's application of state law and to redecide the state law issue. (Pet. Cert. at 10, n.6). He argues erroneously that *Evitts v. Lucey*, 469 U.S. 387, 401 (1985), permits a federal court to review the state-law mandated proportionality review. This Court, however, has not embraced such an expansive view of *Evitts*. *See Pennsylvania v. Finley*, 481 U.S. 551, 557-559 (1987) (distinguishing *Evitts*; state has "substantial discretion" in providing greater benefits than Constitution requires); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (*Evitts* did not create new "strand" of due process to control clemency) (opinion of Rehnquist, C.J.); *see also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1309 (9th Cir. 1996), *rev'd on other grounds*, 519 U.S. 1030 (1997) (*Evitts'* general statement cannot overcome specific ruling in *Walton v. Arizona* rejecting federal court review of state court proportionality analysis). The conclusion of both federal courts below, finding that the Virginia Supreme Court conducted the review contemplated by Virginia law in good faith, renders futile any due process objection to the state court's application of state law. (Pet. App 12a-13a).

Finally, to declare in this federal collateral proceeding that federal courts may review state court applications of state law issues, or that the Constitution requires proportionality review of Virginia cases, would be an impermissible new rule. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Teague v. Lane*, 489 U.S. 288, 295-296 (1984).

II. THE FOURTH CIRCUIT'S RULING UPHOLDING THE STATE COURT'S FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE "FUTURE DANGEROUSNESS" AGGRAVATING CIRCUMSTANCE DOES NOT WARRANT REVIEW.

The Virginia Supreme Court found the evidence sufficient to demonstrate Roach's "future dangerousness" based on both his prior recent criminal record and the circumstances of the present offense. (Pet. App. 15a). Within a seven-month period prior to murdering Mrs. Hughes, Roach had burglarized a private residence, stolen a .357 Magnum pistol from that dwelling, committed two automobile larcenies, and violated a condition of his probation by carrying a shotgun. In this case, Roach killed his defenseless, elderly neighbor who "always had been kind to him" simply because he wanted her car and money. (Pet. App. 56a). After shooting her at point-blank range with a shotgun, Roach left her body in the doorway of her home and took her Social Security money and car keys.[2] The Virginia Supreme Court concluded:

> From this evidence, the jury was entitled to conclude that Roach placed little value on

---

[2] Contrary to Roach's erroneous assertion (Pet. at 14), Virginia law permits a finding of future dangerousness based solely on the facts of the capital offense. Va. Code § 19.2-264.4(C) ("probability based upon evidence of the prior history of the defendant *or of the circumstances surrounding the commission of the offense*") (emphasis added); *Murphy v. Commonwealth*, 431 S.E.2d 48, 53 (Va.) ("future dangerousness" finding upheld solely on facts of the capital murder for hire; 19 year-old defendant had no prior felony record, no history of violence, expressed remorse and cooperated with police), *cert. denied*, 510 U.S. 928 (1993).

> human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery. Given Roach's escalating pattern of criminal behavior culminating in the murder of Mrs. Hughes, the jury had sufficient evidence from which to find, beyond a reasonable doubt, that there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society.

Roach v. Commonwealth, 468 S.E.2d at 112 (footnote omitted).

Roach merely disagrees with the jury, the Virginia Supreme Court, the district court and the Fourth Circuit, all of which found sufficient evidence of his "future dangerousness." The Fourth Circuit's fact-specific conclusion that the state court reasonably rejected Roach's claim certainly fails to present any compelling reason warranting a Court to grant certiorari.

III. ROACH'S "PAROLE ELIGIBILITY" CLAIM WAS CORRECTLY REJECTED BY THE FOURTH CIRCUIT AND, IF ACCEPTED, WOULD VIOLATE THE "NEW RULE" DOCTRINE.

Roach asserts that he was entitled to have his jury informed that he would not be eligible for parole for 25 years if sentenced to life imprisonment. The Fourth Circuit correctly upheld the Virginia Supreme Court's rejection of Roach's claim. (Pet. App. 18a).

On direct appeal, the Virginia Supreme Court ruled that defendants, like Roach, who are *eligible* for parole, are not entitled to have the jury instructed on the time he

would become eligible for parole. *Roach*, 468 S.E.2d at 105. As the Fourth Circuit found, this ruling is consistent with *Simmons v. South Carolina*, 512 U.S. 154 (1994), where this Court carved out an exception to the long-standing rule that States were free to decide whether juries should be informed about parole eligibility. After *Simmons*, a capital murder defendant subject to the death penalty based on his "future dangerousness," who would be *in*eligible for parole as a matter of state law if sentenced to life imprisonment, is entitled as a matter of due process to inform the jury of that parole law. 512 U.S. at 177 (O'Connor, J., concurring).

Roach cannot benefit from the *Simmons* rule because he was not ineligible for parole. As Justice O'Connor's opinion makes clear, "[i]n a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact." 512 U.S. at 176. Justice Blackmun's opinion for four additional members of the Court agreed:

> In a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole.

512 U.S. at 168.

The lower federal courts also have refused to expand *Simmons* to include advising juries about potential parole eligibility. *See Boyd v. Johnson*, 169 F.3d 907, 912-913 (5th Cir. 1999); *Wilson v. Greene*, 155 F.3d 396, 407-408 (4th Cir.), *cert. denied*, 119 S.Ct. 536 (1998); *Arnold v. Evatt*, 113

F.3d 1352, 1363 (4th Cir. 1997). Roach's requested expansion of *Simmons* undoubtedly would be an impermissible new rule.[3] *See O'Dell v. Netherland*, 521 U.S. 151, 164-166 (1997) (*Simmons* itself announced a new rule).

IV. ROACH'S DEFAULTED CLAIM ATTACKING THE SENTENCING INSTRUCTION PRESENTS NO COMPELLING REASON FOR REVIEW.

Roach alleges that the trial court erred in giving the Virginia model jury instruction that specifies that the sentencing verdict must be unanimous. He asserts that the instruction misstates Virginia law because, in the absence of an agreement on sentence, the capital murder defendant receives life imprisonment. *See* Va. Code § 19.2-264.4(E).

Roach did not object to this instruction at trial, nor did he raise this claim on direct appeal.[4] Instead, he presented the claim to the Virginia Supreme Court for the first time in his state habeas petition and the state court expressly found the claim defaulted. The Fourth Circuit

---

[3] In the Fourth Circuit Roach admitted that many state courts and other federal courts of appeals agree with the interpretation of *Simmons* adopted by the Virginia Supreme Court and the Fourth Circuit, and that the rule he sought "has never been expressly endorsed by a majority of the Justices of the Supreme Court. . . . " (Resp. App. 2), thus effectively conceding that he asks this Court to adopt and apply a new rule.

[4] Roach's own proffered verdict form for sentencing *also* recited that "[a]ny decision you make regarding punishment must be unanimous." (Resp. App. 4). His default thus cannot be any clearer.

correctly enforced the default and refused relief.[5] In his federal petition, Roach included a claim of ineffective assistance of *appellate* counsel in an effort to avoid his default of the jury unanimity claim. Both courts below, however, correctly concluded that this claim too was defaulted and also without merit. (Pet. App. 21a-22a). This Court obviously should not grant certiorari to review Roach's defaulted claim.

V. THE FOURTH CIRCUIT RULED CORRECTLY THAT NO ADDITIONAL ASSESSMENTS OF A JUVENILE'S MATURITY ARE CONSTITUTIONALLY REQUIRED BEFORE TRANSFER FOR TRIAL AS AN ADULT.

Roach alleges that Virginia law allowed his transfer from juvenile court to the circuit court for trial as an adult without providing for an individual inquiry into his maturity and culpability *prior* to transfer. On direct

---

[5] Even if the default was not dispositive, the claim cannot merit relief. As a matter of Virginia law, the trial court should not instruct the jury that a life sentence will be imposed by the judge if the jury cannot agree. *See Spencer v. Commonwealth*, 384 S.E.2d 785, 799 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) (proper to refuse instruction that tells jury court will impose life sentence if jury cannot agree on sentence); *Eaton v. Commonwealth*, 397 S.E.2d 385, 398-399 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991) ("while Code § 19.2-264.4(E) provides for the imposition of a life sentence by the trial court when the jury cannot agree upon a penalty, the jury, nevertheless, has a duty conscientiously to attempt to arrive at a sentence."). In *Jones v. United States*, 119 S.Ct. 2090 (1999), in the context of reviewing the federal death penalty statute, this Court agreed with the Virginia Supreme Court's approach.

appeal, Roach raised a similar claim and the Virginia Supreme Court rejected the claim, relying on its prior decisions in *Wright v. Commonwealth*, 427 S.E.2d 379, 383-384 (Va. 1993), and *Thomas v. Commonwealth*, 419 S.E.2d 606, 609 (Va. 1992). *See Roach*, 468 S.E.2d at 105. (Pet App. 40a).

Roach's claim is based on his misreading of *Stanford v. Kentucky*, 492 U.S. 361 (1989). Contrary to Roach's assertion, *Stanford* did not impose a constitutional requirement that States provide a juvenile transfer proceeding that includes "individualized consideration of the maturity and moral responsibility" of juvenile offenders. Indeed, the Court there considered whether the Eighth Amendment permitted the execution of sixteen- or seventeen-year-old defendants. In one part of the *Stanford* decision, Justice Scalia identified the constitutional requirement of "individualized consideration" which exists in *every* capital case sentencing, and noted that the requirement of consideration of age is satisfied by state laws "specifically designating the defendant's age as a mitigating factor in capital cases."[6] *Stanford*, 492 U.S. at 375. Virginia law expressly includes the defendant's age as a matter the jury may consider in mitigation. *See* Va. Code § 19.2-264.4(B)(v). Justice Scalia's passing observation that statutes in Kentucky and Missouri also required assessments of the "maturity" of the juvenile at the transfer proceeding simply does not purport to impose an additional constitutional requirement.

---

[6] This part of Justice Scalia's opinion, moreover, represented the view of only four Justices and, therefore, is not the holding of the Court.

Roach asks this Court now to declare a "new rule" to require a restructuring of States' juvenile transfer procedures, imposing a new pre-transfer constitutionally-required maturity hearing. Such a proposed rule may be considered, if at all, only in a direct appeal of a criminal conviction and not in federal collateral proceedings. *See Caspari*, 510 U.S. at 390; *Johnson v. Texas*, 509 U.S. 350, 352-353 (1993); *Teague*, 489 U.S. at 310.

The Fourth Circuit correctly upheld the Virginia Supreme Court's conclusion that Virginia's capital sentencing procedures allowed for the individualized consideration of the defendant's age as a mitigating factor. (Pet. App. 27a-28a). This Court should not grant certiorari to review a claim that, if accepted, would constitute an impermissible "new rule."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK L. EARLEY
Attorney General of Virginia

ROBERT Q. HARRIS
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624